In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 460

JOSEPH MONTANARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 18–19) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1966 (Pet. App. 17). On July 22, 1966 Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including August 19, 1966, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for assaulting federal agents in performance of their official duties in making an arrest, the court erred in instructing the jury that the government need not prove petitioner's knowledge that they were federal agents.

2. Whether the assault would be subject to punishment even if the federal wagering tax statute were subsequently declared unconstitutional.

STATUTE INVOLVED

18 U.S.C. 111 provides in pertinent part as follows:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 [listing certain federal officers, including Internal Revenue agents] of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
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STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Eastern District of New York on two counts of an indictment charging separate assaults on the same day against Internal Revenue agents engaged in their official duties, in violation of 18 U.S.C. 111 (App. I, 4a, 6a–7a, 38a–39a).[1] He was given concurrent sentences of imprisonment for one year and one day on each count and was sepa-

[1] "App. I" refers to Appellant's Appendix; "App. II," to Appellee's Appendix.

rately fined $1,250 on each count (App. I, 4a). On appeal the conviction was affirmed (App. I, 5a; Pet. App. 17).

1. The evidence showed that on the afternoon of October 3, 1963, Internal Revenue agents were seated in unmarked government cars on a Brooklyn street (App. II, 5a–6a, 24a–26a, 45a–46a, 64a–65a, 74a–75a), awaiting the arrival of petitioner, for whom they had a federal warrant of arrest for violation of the federal wagering tax statute (App. II, 10a, 39a, 44a, 71a). When the agents were alerted by radio that petitioner's Plymouth station wagon was approaching, they moved their cars into a triangular formation so that they blocked the path of his vehicle (App. II, 8a–12a, 22a–23a, 28a–30a, 66a–67a, 75a–76a). As agents Foy and Bellon approached petitioner's station wagon, they held their federal badges in the air so that petitioner could see them (App. II, 12a, 31a–32a). Agent Foy told petitioner he was a federal agent and started to inform him about the arrest warrant, when petitioner started moving his vehicle forward, which resulted in Foy being pinned next to his car so that his hips were crushed between the two cars (App. II, 12a–13a, 18a–19a, 38a, 49a–51a, 68a, 77a). Shortly afterward petitioner, in attempting to drive through an opening between two of the government vehicles, knocked down agent Bellon, who suffered an injury to his left hip (App. II, 13a, 33a–35a, 51a). When petitioner ignored the command of agent Namorato to stop, the agent pointed a gun at petitioner's head. Petitioner then stopped his vehicle, and was promptly arrested (App. II, 52a, 78a).

Petitioner testified on his own behalf that he thought the men were trying to rob him, and that he did not hear any of them say he was a federal agent with a warrant for petitioner's arrest (App. II, 81a). Petitioner denied that his car collided with either of the injured agents (App. II, 83a).

2. At the close of the government's case petitioner's counsel made a motion for dismissal of the indictment on the ground that it failed to allege that petitioner knew that the agents were federal officers engaged in official duties. Counsel stated that he was aware of the contrary ruling in *United States* v. *Lombardozzi,* 335 F. 2d 414 (C.A. 2). The court denied the motion (R. 501–505). In its final charge the court instructed, without objection by petitioner's counsel, as follows (App. I, 24a):

> Now, the Government need not prove that this defendant knew that these agents were federal agents. Of course, as Mr. Lewis (petitioner's counsel) pointed out in his summation, you may, of course, consider it in determining whether or not the Government proved that the acts which the Government charges were committed, were done wilfully.

ARGUMENT

1. Petitioner has demonstrated no sound reason for re-examination of the recent decisions of *United States* v. *Lombardozzi,* 335 F. 2d 414 (C.A. 2), certiorari denied, 379 U.S. 914, and *Bennett* v. *United States,* 285 F. 2d 567 (C.A. 5), certiorari denied, 366 U.S. 911, holding that in a prosecution under 18 U.S.C. 111, it is not necessary that the government

prove that the accused knew that the persons assaulted were federal agents. That this is the proper interpretation of 18 U.S.C. 111 is apparent from its clear language. The statute provides that whoever assaults, resists, etc., a federal officer in the performance of his official duties shall be punished; it does not require that the doer of the prohibited act shall have knowledge that the person assaulted is a federal officer.[2] Unjustified forcible assault can never be an innocent act; one who knowingly commits such an assault necessarily knows that he is committing a crime. Thus the interpretation of the statute adopted in the cases cited does not eliminate the element of intent. The question whether the person assaulted is or is not a federal officer does not go to the criminality of the act done; it goes to the question of which sovereignty shall try and punish the criminal act. It is entirely proper for the federal government to try a criminal assault upon its officer. One of the purposes of the statute was to make it unnecessary for the government to rely upon the courts of the States for the protection of its investigative and law enforcement personnel. S. Rep. No. 535, 73d Cong., 2d Sess.; H. Rep. No. 1455, 73d Cong., 2d Sess. It is the federal office of the person assaulted which properly gives federal jurisdiction over the crime.[3]

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[2] See *United States* v. *Lombardozzi*, *supra*, at 416.

[3] Petitioner's constitutional claim amounts to an assertion that, as a concomitant of due process, he has a right to know, prior to committing a criminal assault, whether a federal or a state court will have jurisdiction to try him. Calling this a "scienter" requirement (Pet. p. 6 *et seq.*) is quite misleading. In this case,

2. Despite petitioner's attempt to suggest otherwise, there is no conflict among the circuits.

In *Pettibone* v. *United States*, 148 U.S. 197, this Court, in holding that an indictment for conspiracy to obstruct justice in federal courts by violating an injunction must allege that defendants knew of the existence of a federal injunction, stated that an indictment against a person for corruptly endeavoring to influence or impede a witness or officer in a court of the United States in the discharge of his duty must charge notice on the part of the accused that the person sought to be influenced was indeed a witness or officer (148 U.S., at 206). At that time, there was no general statute punishing assaults upon federal officers. Aside from the obstruction of justice statute, federal law punished only resistance to specified officers in the discharge of their duties (18 U.S.C. (1934 ed.) 118, 33 Stat. 1265, 35 Stat. 1100). Resistance of officers in the performance of duty can plausibly be regarded as requiring knowledge of that duty.

In 1934, however, Congress enacted a statute (48 Stat. 780) providing (in Section 1, 18 U.S.C. (1934 ed.) 253) for punishment of anyone who killed any specified officer of the United States "while engaged in the performance of his official duties, or on account

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and all other cases under 18 U.S.C. 111, the government must prove the intentional commission of acts constituting the offense. Here the government proved beyond a reasonable doubt that petitioner committed an intentional assault. That the victims were federal officers is pertinent only as to jurisdiction.

of the performance of his official duties," and (in Section 2, 18 U.S.C. (1934 ed.) 254) for punishment of persons who "shall forcibly resist, oppose, impede, intimidate, or interfere" with such officer "while engaged in the performance of his official duties" or "shall assault him on account of the performance of his official duties." Prior to 1948, the Sixth Circuit held, in a prosecution under the assault provision (Section 2), that knowledge of the officer's status was an element of the offense. *Sparks* v. *United States,* 90 F. 2d 61. Later, however, without referring to *Sparks,* the same court held, in a prosecution under the killing provision (Section 1), that knowledge of the character of the victim's employment was not a necessary element of the offense. *McNabb* v. *United States,* 123 F. 2d 848, reversed on other grounds, 318 U.S. 332. Under the wording of the statutes then in effect, the difference of result could perhaps be justified; for, while Section 1 applied whenever an officer was engaged "in the performance of his official duties," Section 2 was limited to assaults "on account of" the performance of official duties, a standard which requires reference to the defendant's purpose. See *Portnoy* v. *United States,* 316 F. 2d 486 (C.A. 1). This anomalous situation was corrected by the 1948 revision of the Code which, in Section 111, combined former Sections 118 and 254, and enacted the statute in its present form. The reviser's notes state that the consolidation was made "with changes in phraseology and substance necessary to effect the consolidation."

Since the statute now punishes assaults on an officer "while engaged in" the performance of his duties, it reflects a Congressional purpose to make the *McNabb* result with respect to killing applicable to assaults on federal officers as well. This is undoubtedly one of the changes in "substance" to which the reviser referred. It is true that after the 1948 revision the Fifth Circuit held otherwise, with respect to assault prosecutions, in *Hargett* v. *United States*, 183 F. 2d 859, 864–865, and in *Hall* v. *United States*, 235 F. 2d 248. However, in its most recent decision on the subject, *Bennett* v. *United States*, 285 F. 2d 567, certiorari denied, 366 U.S. 911, the Fifth Circuit has indicated that it now accepts the view that knowledge of the federal character of an officer is not a necessary element of the offense. Thus, the cases discussed by petitioner are either distinguishable or are consistent with the Second Circuit's result in *Lombardozzi* and in this case, and no conflict among the circuits presently exists.

3. Since the agents were executing a federal warrant valid on its face at the time of the assault, petitioner's conduct was subject to prosecution, even if this Court should ultimately hold the wagering tax statute unconstitutional, a question to be considered in *Costello* v. *United States*, No. 41, this Term. In *Dennis* v. *United States*, 384 U.S. 855, 864–867, this Court held that the unconstitutionality of a statute requiring affidavits would not be a defense to a charge of conspir-

ing to file false affidavits.[4] Still less would a holding that a statute named in a valid warrant was unconstitutional, made over three years after the event, be a justification for an assault on an officer attempting to execute such warrant.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] See also the cases cited in *Dennis* v. *United States*, *supra*, at 866.

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